

**FINAL AWARD ALLOWING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 08-108901

Employee: Justin Smallwood

Employer: J. E. Dunn Construction

Insurer: American Home Assurance c/o AIG Domestic Claims, Inc.

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 27, 2010. The award and decision of Administrative Law Judge Lisa Meiners, issued August 27, 2010, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 14<sup>th</sup> day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

## FINAL AWARD

Employee: Justin Smallwood

Injury No. 08-108901

Dependents: N/A

Employer: J.E. Dunn Construction

Insurer: American Home Assurance c/o AIG Domestic Claims, Inc.

Additional Party: N/A

Hearing Date: June 28, 2010

Checked by: LM/lh

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: December 8, 2008.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was Claim for Compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was using a tag line to steady a 55,000 pound wall while the wall was being transported by a crane and suffered a hernia.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Hernia/body as a whole.
14. Nature and extent of any permanent disability: Permanent Partial Disability.
15. Compensation paid to-date for temporary disability: -0-.

16. Value necessary medical aid paid to date by employer/insurer? -0-
17. Value necessary medical aid not furnished by employer/insurer? \$22,247.87
18. Employee's average weekly wages: \$1,225.37.
19. Weekly compensation rate: \$772.53/\$404.66.
20. Method wages computation: By agreement.

### **COMPENSATION PAYABLE**

21. Amount of compensation payable from the Employer:

Temporary total disability: 3 weeks, totaling \$2,317.59  
Permanent partial disability: 10 % body as a whole, totaling \$16,186.40  
Past Medical: \$22,247.87

Total: \$40,751.86

22. Second Injury Fund liability: N/A.
23. Future requirements awarded: None

Said payments to begin as of the date of the award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Mark E. Kelly.

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Justin Smallwood Injury No. 08-108901  
Dependents: N/A  
Employer: J.E. Dunn Construction  
Insurer: American Home Assurance c/o AIG Domestic Claims, Inc.  
Additional Party: N/A  
Hearing Date: June 28, 2010 Checked by: LM/lh

### **FINDINGS OF FACT AND RULINGS OF LAW**

#### **STIPULATIONS:**

1. Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act and liability is fully insured by American Home Assurance c/o AIG Domestic Claims, Inc;
2. On or about December 8, 2008, Justin Smallwood was an employee of J.E. Dunn Construction;
3. Employer had notice of employee's accident;
4. Employee's claim was filed within the time allowed by law;
5. Employee's average weekly wage was \$1,225.37, resulting in a maximum compensation rate of \$772.53 for temporary total disability benefits and \$404.66 for permanent partial disability benefits; and
6. Employer and Insurer stipulated the past medical care expenses were as listed in Employee's Exhibit E but do not stipulate that they were related to the accident.

#### **ISSUES:**

The issues to be determined by the hearing are as follows:

1. Whether on or about December 8, 2008, the employee suffered an accident arising out of and in the course and scope of his employment;
2. Whether the employee is entitled to permanent partial disability benefits; and
3. Whether the employee is entitled to temporary total disability benefits.

#### **FINDINGS OF FACT:**

A hearing was held on June 28, 2010, before the Honorable Lisa Meiners. Claimant appeared in person and was represented by Mark E. Kelly. J.E. Dunn and American Home Assurance were represented by John Jurcyk.

During the morning of December 8, 2008, Justin Smallwood reported to work for J.E. Dunn Construction (hereinafter "J.E. Dunn") as an ironworker, where he had worked on and off for the past eleven years. During the morning of December 8, 2008, he was working with a group placing pre-cast walls on the upper level of a development. The pre-cast walls were 10 x 30 feet in size and weighed approximately 55,000 pounds. The walls were hooked to a crane using four "swivels" and four "burks." The burks weighed approximately 15 to 20 pounds and slid into a hole in the pre-cast wall and hooked the crane to the wall. Mr. Smallwood also used spreaders to hook onto the wall which he carried two at a time, weighing approximately 30 pounds apiece.

After the walls were attached to the crane, Mr. Smallwood used a rope attached to the bottom corner of the wall, called the tag line, which was used to steady the wall. Mr. Smallwood applied tension to the rope to ensure the wall did not swing out of control, a task that required application of roughly 100 to 300 pounds of force. This task usually required up to four men but Mr. Smallwood did not have such help on December 8, 2008. Additionally, the walls that were placed had to be moved approximately 100 feet to the desired position.

Mr. Smallwood testified once the walls were set, the welders would weld plates to them. Mr. Smallwood would get the galvanized plates they welded to the wall and would grind them to prepare them for welding. On December 8, 2008, Mr. Smallwood assisted with getting the wall in place and then picked up 4' x 4' plates in order to walk them up the hill where the generator was located to grind them. After guiding the first wall, Mr. Smallwood bent down to pick up a stack of plates to carry to the generator and felt a pinch in his lower abdomen. Despite feeling the pinch, he continued to pick up the plates and carry them to the grinder. He went back down the hill to pick up additional plates and when he bent down to grab another set, he felt another sharp pinch in his side. However, he picked the plates up and carried them up the hill to grind.

After grinding the plates, Mr. Smallwood went to the restroom to check the area of pain and noticed he had lump located a couple of inches below his belt line that had not previously been there. On the first break, Mr. Smallwood notified his foreman, Gary Clary, about the bulge and the foreman advised him to fill out an accident report.

Justin was subsequently referred to OHS Compcare for examination. The records reflected Mr. Smallwood was picking up steel plates that morning when he developed the stinging sensation in his left lower quadrant and abdomen. Dr. Payne noted this persisted when he bent at the waist to pick up other objects weighing approximately 30 lbs. The records reported Mr. Smallwood mentioned this to his supervisor and he was sent for evaluation. Dr. Payne noted Justin was not suffering nausea or vomiting and he placed his discomfort at a 4 on a scale of 1 to 10. Justin denied any similar problem previously. Dr. Payne performed a physical examination and diagnosed a left inguinal with possible inguinal muscle strain. He placed him on restricted duty of no lifting or carrying more than 25 lbs and prescribed Relafen to relieve his pain.

Justin was seen by Dr. Payne on December 12, 2008, for follow-up. Justin was still suffering a burning sensation and reported the bulge to Dr. Payne. Dr. Payne noted on physical examination there was a bulge in the left inguinal area but no definite herniation which was palpable. Dr. Payne diagnosed an inguinal hernia and recommended referral to a general surgeon for follow-up care. He modified the lifting limit to 10 lbs in the interim.

Justin was subsequently seen by Dr. Joseph Petelin on December 17, 2008. Dr. Petelin diagnosed a left inguinal hernia and referred him for hernia repair. It was noted on both Dr. Payne's records as well as Dr. Petelin's that Justin began feeling the pain when he was lifting plates and apparently someone at J.E. Dunn concluded that could not be the mechanism for injury and; therefore,

denied liability for a compensable injury. Dr. Petelin however, subsequently performed the laparoscopic hernia repair on January 27, 2009, at Shawnee Mission Medical Center. Dr. Petelin's Form 9 medical report indicated Justin could return to light duty in three (3) weeks following the surgery or full duty in six (6) weeks after the surgery.

Dr. Michael J. Poppa performed an independent medical evaluation of Mr. Smallwood on January 12, 2010. Dr. Poppa took a history of the injury, reviewed all the medical records and performed a physical examination. Dr. Poppa noted Mr. Smallwood did not have any prior significant injuries requiring treatment involving his left groin/abdomen prior to his work accident on December 8, 2008. On physical examination, Dr. Poppa reported Mr. Smallwood had a well healed surgical incision with evidence of several well healed laparoscopic portals secondary to recent left inguinal hernia repair. There was no evidence of recurrent left inguinal hernia on digital exam or abdominal/inguinal palpation. Mr. Smallwood reported pain on palpation to his lower abdominal muscles.

Dr. Poppa testified Mr. Smallwood reported the duties of working the wall, following the wall and then holding it and maintaining it was a strenuous process. Although Mr. Smallwood noted he hurt all over, he did not let it stop him from working. Dr. Poppa testified Mr. Smallwood first noticed the pain in his abdomen when he was bending over to pick up the plates. Dr. Poppa testified it was his medical opinion that Mr. Smallwood was injured while stabilizing the large pre-cast wall. However, he completed that task and it was sometime shortly thereafter, while bending over, Mr. Smallwood noticed the pain. Dr. Poppa testified Mr. Smallwood suffered a left inguinal hernia.

Dr. Poppa opined the activities of flying the wall was the probable and reasonable cause of Mr. Smallwood's inguinal hernia. Dr. Poppa explained there was a lot of force involved to stabilize the large wall that was inherent in the "flying" process of the crane, picking it up and moving it as it twisted and turned and pivoted and rotated. Because the wall could go in any direction at anytime, it required exerting not only a lot of body pressure but specifically abdominal pressure in the inguinal and lumbar area. Because of these factors, Dr. Poppa felt this was an unusual stress that was specific in time that caused Mr. Smallwood's injuries. Dr. Poppa felt it was not until Mr. Smallwood changed his position and bent over that he experienced the pain. Dr. Poppa explained, from a medical standpoint, he believed the hernia occurred while performing the flying of the wall. It was not until Mr. Smallwood bent over that the increased abdominal pressure pushed the contents out causing Mr. Smallwood to begin suffering pain. This was similar to a straw breaking the camel's back and pushing it over the limit.

Dr. Poppa testified Mr. Smallwood's work related injury was the direct, proximate and prevailing factor in causing both his work related medical conditions and disability. The prevailing factor was the primary factor in relation to any other factor causing his work related medical conditions and disability. As a result of his work injury, Mr. Smallwood underwent laparoscopic hernia repair on January 27, 2009, and post-operatively, was placed on light duty with progressional duty. Mr. Smallwood reported his employer was unable to accommodate his initial work restrictions and he remained off work approximately three weeks. It was Dr. Poppa's opinion Mr. Smallwood was temporarily totally disabled during the period of time he was off work when his employer could not accommodate his restrictions. Dr. Poppa felt all treatment Mr. Smallwood received to date regarding his work related medical condition was reasonable, appropriate and directly necessary to care and relieve the effects of his December 8, 2008, injury.

Dr. Poppa opined Mr. Smallwood suffered a 10% permanent partial disability of the body as a whole due to his work related injury involving his abdomen (traumatic strain) and groin (left inguinal hernia and laparoscopic repair) with post-operative residuals. Dr. Poppa also testified Mr. Smallwood reported his abdomen was still "pretty sore." Dr. Poppa felt Mr. Smallwood was capable of performing activities of daily living and work activities but the difference is how one completes those tasks as

compared to before a hernia and the amount of discomfort or even pain that now accompanies those activities.

## RULINGS

Employer and Insurer have challenged whether Justin Smallwood suffered an accident in the course and scope of his employment while working for J.E. Dunn.

The courts have held when a condition is beyond the understanding of a lay person, expert testimony is required. "For an injury to be compensable the evidence must establish a causal connection between the accident and the injury. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause and extent of the disability when the facts fall within the realm of lay understanding...An injury may be of such a nature (however) that expert opinion is essential to show that it was caused by the accident to which it is ascribed." (Citations omitted). Griggs v. A. B. Chance Company, 503 S.W.2d 697, 704 (Mo.App. 1974). The courts have further noted that, "medical causation not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause." Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 222 (Mo.App. 1992).

The applicable statute pertaining to accident provides as follows:

"Accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or participating factor.

In this chapter, the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Section 287.020 R.S.Mo. (2005).

The applicable statute pertaining to hernias states as follows:

In all claims for compensation for hernia resulting from injury arising out and in the course of the employment, it must be definitely proved to the satisfaction of the Division or the Commission:

- (1) That there was an accident or unusual strain resulting in hernia;
- (2) That the hernia did not exist prior to the accident or unusual strain resulting in the injury for which compensation is claimed.

Section 287.195 R.S.Mo. (1980).

Although the Employer and Insurer argue the act of bending to pick up a 30 pound plate is not an accident or an unusual strain, I find Claimant sustained an unusual strain moving large concrete walls based on the testimony of Mr. Smallwood and Dr. Poppa. Mr. Smallwood testified the tasks he

performed required significant manual labor, as well as a great amount of effort in order to steer the wall. Even though he had performed this task before, this action still qualifies as an unusual strain. This strain was enough I find to cause a hernia. Additionally, the task of steering the wall usually involved up to four men to accomplish, but Mr. Smallwood did not have assistance on December 8, 2008. The evidence establishes Mr. Smallwood suffered an inguinal hernia on December 8, 2008, resulting from an injury arising out of the course and scope of his employment. There is no evidence or testimony Mr. Smallwood had a hernia that existed prior to the accident or unusual strain.

Employer and Insurer rely on McClain vs. Yellow Cab Co., 439 S.W.2d 200 (Mo.App. 1969) for the proposition that Mr. Smallwood did not injury himself through an unusual strain as he was engaged in an activity that was not different from his “usual” routine. However, this basis for determining unusual strain was redefined by the court in Wolfegeher vs. Wagner Cartage Service, Inc., 646 S.W.2d 781 (Mo. 1983). “In determining whether an unusual strain occurred, we must focus on the fact that the injury occurred rather than what act or force immediately preceded the injury.” Pattengill vs. General Motors Corporation, 845 S.W.2d 630, 632 (Mo.App. 1992), quoting Viola Custom Coatings, Inc., 664 S.W.2d 266 (Mo.App. 1984) and Wolfegeher at 267. Additionally, gradual and sustained stress qualifies as an accident for workers’ compensation purposes. Smith vs. Climate Engineering, 939 S.W.2d 429 (Mo.App. 1996).

The facts in Pattengill are similar to this case. The employee in Pattengill was working on top of a 12 foot A-frame ladder attempting to guide a 300 to 500 pound burner, which was elevated by four men using ropes, into a proper position so a bolt could be secured to it. Pattengill at 630. This activity required the employee to extend his arms above his head and stretch as far as he could reach. Id. While in this position, the employee felt a “ting” in his groin area. Id. After analyzing the facts the Court of Appeals found, “here claimant was injured while standing on top of a 12-foot ladder and reaching up as far as he could to guide a 300- to 500-pound object suspended over his head by ropes held by four men. Clearly, this qualifies as an unusual strain.” Id. Likewise, the employee in this case was performing a very strenuous task which involved using his whole entire body strength including his abdominal and lumbar muscles to steady a wall that was constantly moving and changing position. I find this task to be strenuous and an unusual strain, which in turn caused Mr. Smallwood’s hernia.

Employer and Insurer also argue Mr. Smallwood’s injury was ideopathic as the pain was initially felt when Mr. Smallwood bent over to pick up plates immediately following the strenuous activity of steering the wall. However, the Employer and Insurer’s position is not supported by credible expert testimony. As noted above, Dr. Poppa opined the activity of “flying” the wall was the probable and reasonable cause of the inguinal hernia. Dr. Poppa likened the activity of flying the wall to cattle roping as it required force to maintain the position of the wall that could continually twist and turn. Dr. Poppa explained his medical reasoning that there was a lot of force involved to stabilize the large wall requiring Mr. Smallwood to exert not only a lot of body pressure but specifically abdominal pressure in the inguinal and lumbar area. Accordingly, I find Mr. Smallwood proved an accident occurred in the course and scope of his employment.

Mr. Smallwood is seeking temporary total disability compensation for the period of three weeks, from the date of surgery when he was restricted to light duty by Dr. Petelin.

Section 287.270, RSMo, provides that an injured employee is to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7 as the “inability to return to any employment and not merely...[the] inability to return to the employment in which the employee was engaged at the time of the accident.” Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. Vinson v. Curators of

Univ. of Missouri, 822 S.W.2d 504 (Mo.App. 1991); Phelps v. Jeff Wolk Const. Co., 803 S.W.2d 641, 645 (Mo.App. 1991); and Williams v. Pillsbury Co., 694 S.W.2d 488 (Mo.App. 1985).

The employee has the burden of proving that he or she is unable to return to any employment. Such proof is made only by competent and substantial evidence. It may not rest on speculation. Griggs v. A.B. Chance Company, 503 S.W.2d 697, 703 (Mo.App. 1974). The employee's testimony alone can constitute substantial evidence to support an award of temporary total disability. Evidence of temporary disability given by the employee is not necessarily beyond the realm of understanding by lay persons. Riggs v. Daniel Intern, 771 S.W.2d 850, 851 (Mo.App. 1989).

I find Claimant was temporarily totally disabled from January 27, 2009 to February 10, 2009. Mr. Smallwood's testimony supports his claim for temporary total disability.

Mr. Smallwood testified he was placed on light duty work and his Employer was unable to accommodate his lifting restrictions. It is unreasonable and unrealistic to expect an employer to hire an employee, who is on restrictions, to work for a three week period of time before they return to their permanent job. Additionally, Employer and Insurer offered no testimony that J.E. Dunn was able to accommodate Mr. Smallwood's restrictions. Accordingly, I find Mr. Smallwood's testimony to be credible and there is no evidence to the contrary.

Therefore, Mr. Smallwood has met his burden of proof for temporary total disability compensation. The Employer and Insurer shall pay \$2,317.59, for the claimed time period Mr. Smallwood was temporarily totally disabled.

"Employee had the burden of proving his entitlement to benefits for care and treatment authorized by §287.140.1 i.e., that which is reasonably required to cure and relieve from the effects of the work injury." Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 266 (Mo.App. 2004); Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App. 2001). Meeting that burden requires that the past bills be causally related to the work injury. Bowers, 132 S.W.3d at 266; Pemberton v. 3M Co., 992 S.W.2d 365, 368-69 (Mo.App. 1999).

The employee must prove the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. Chambliss v. Lutheran Medical Center, 822 S.W.2d 926 (Mo.App. 1991), overruled in part on the grounds by Hampton, 121 S.W.3d at 229; Jones v. Jefferson City School District, 801 S.W.2d 486, 490-91 (Mo.App. 1990), overruled in part on other grounds by Hampton, 121 S.W.3d at 230; Roberts v. Consumers Market, 725 S.W.2d 652, 653 (Mo.App. 1987); Brueggemann v. Permaneer Door Corporation, 527 S.W.2d 718, 722 (Mo.App. 1975). The employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence that relate to the services provided. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo.App. 1994), overruled in part on other grounds by Hampton, 121 S.W.3d at 228; Lenzini v. Columbia Foods, 829 S.W.2d 482, 484 (Mo.App. 1992), overruled in part on other grounds by Hampton, 121 S.W.3d at 229; Wood v. Dierbergs Market, 843 S.W.2d 396, 399 (Mo.App. 1992), overruled in part on other grounds by Hampton, 121 S.W.3d at 229. The medical bills in Martin were shown by the medical records in evidence to relate to the professional services rendered for treatment of the product of the employee's injury. Martin, 769 S.W.2d at 111.

Mr. Smallwood submitted into evidence the medical records and bills reflecting the treatment he received. The total medical bills were itemized and admitted as Exhibit E and the Employer and Insurer have not disputed the amounts were reasonable and necessary to cure Mr. Smallwood of his injuries. The medical records correlate with the medical bills entered into evidence. Further, Dr. Poppa reviewed the medical records and found they were reasonable and necessary to cure and relieve Mr. Smallwood of the

symptoms of his December 8, 2008 injuries. I find Mr. Smallwood met his burden of proof regarding the past medical expenses and the Employer and Insurer are therefore liable for past medical expenses in the amount of \$22,247.87.

Mr. Smallwood has asserted a claim for permanent partial disability benefits from his Employer and Insurer.

Dr. Poppa was the only physician to offer an opinion regarding permanent disability due to the traumatic strain of the abdomen and the left inguinal hernia with laparoscopic repair and post-operative residuals. Mr. Smallwood testified while he was capable of performing his work activities, he was still "pretty sore" in his abdominal region due to the hernia. Additionally, Dr. Poppa explained the basis for his opinion given the surgical nature. Once tissues have been cut due to surgery, they are not as strong as they once were. Additionally, once a foreign body has been inserted, in this case the mesh, there are always problems associated with having a foreign body in place and the possibility of removal of that foreign body, even if the occurrence is uncommon. Although Dr. Poppa did not have any specific lifting restrictions, he recommended Mr. Smallwood exercise good body mechanics in order to avoid suffering another hernia or trauma to his abdominal area.

Based upon the evidence presented, I find Claimant sustained 10% permanent partial disability body as a whole. The Employer and Insurer are therefore directed to pay \$16,186.40, representing 10% of the body as a whole.

Interest shall be provided as by law.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Lisa Meiners  
Administrative Law Judge  
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this \_\_\_\_ day of \_\_\_\_\_, 2010, by:

\_\_\_\_\_  
Naomi Pearson  
Division of Workers' Compensation